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Nos. 86-1877 & 86-1901

In The

Supreme Court of the United States

October Term, 1986

CHARLES F. FOGERTY, *et al.*,
Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioners, Charles F. Fogerty, *et al.*, and Tahoe Shorezone Representation. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the Petitions for Writ of Certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

On March 30, 1987, PLF argued the case of *Nollan v. California Coastal Commission,* No. 86-133, *juris. noted,* October 20, 1986. As in *Nollan,* this case reveals once again the incessant effort by the State of California to extend a public right of access and use over private waterfront property. *Nollan* involved an attempt to exact such property by a "required dedication" imposed as a condition to obtaining a building permit. Here the mechanism is the employment of an expansive "public trust" easement concept. The intended result, however, is the same—the acquisition of private property for public use without the payment of compensation. In the instant situation, however, no triggering action by the property owners was involved. No requests for development permits were

looked to for justification. Here, the result is simply accomplished by judicial fiat.

Amicus believes the opinion below poses a serious threat to the integrity of the individual right of property by violating constitutional prohibitions against the taking of property without compensation as well as due process guarantees. The result also violates fundamental notions of fairness and equity.

STATEMENT OF THE CASE

The opinion below[1] involves private property, much of it residential, fronting on Lake Tahoe. Historically, titles were derived from two separate sources which must be evaluated separately in terms of the legal issues presented.

First, there are those lands which were below natural high water mark at the time of California's admission to the Union on September 9, 1850. These were lands which the state, by virtue of its sovereignty, was entitled to either claim or not claim, as it might choose. California adopted the rule that lands fronting on navigable nontidal, *i.e.*, inland, waters extended to low water mark, a rule which since 1872 has been embraced in California Civil Code § 830. The California Supreme Court in *Lyon*, 29 Cal. 3d at 225, held that the effect of Section 830 was to

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[1] In referring to the opinion below, and the interim decisions leading up to the final judgment, this amicus will adopt the references used by petitioner, Tahoe Shorezone Representation. Thus, the interim opinion by the California Supreme Court in *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240 (1981), will be referred to as *Fogerty I;* the companion case in *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210 (1981), will be referred to as *Lyon;* and the opinion of the Court of Appeal in *Fogerty v. State of California*, 187 Cal. App. 3d 224 (1986), will be referred to as *Fogerty II.*

grant to private persons "title to the beds of navigable bodies to low water mark."

Despite recognition that such lands were long ago conveyed into private ownership, the California Supreme Court in *Fogerty I* and *Lyon* resurrected a state claim by application of a "public trust" concept. The result is that the State of California, by the judgment below, has reasserted an interest so broad that for all practical purposes it swallows up the fee long since conveyed away. Under this approach, public rights between high and low water mark are not limited to navigational or water related uses. When water levels are low, it is declared that such lands, *even though dry,* nevertheless are open to public entry for nonwater related uses, including picnicking, hunting, and hiking. *Fogerty I,* 29 Cal. 3d at 245.[2] The doctrine also requires "preservation of the land in its natural state." *Fogerty II,* 187 Cal. App. 3d at 233.

Secondly, there are those lands upland of the natural high water mark—fast lands to which the state could never have asserted a claim by virtue of its sovereignty and which long ago were patented into private ownership by the federal government. The opinion below holds that even this type of land is subject to California's public trust doctrine if such land has been subject to periodic flooding due to the construction and operation of a dam by others. All that is required is the passage of time, and unsuspecting property owners will awaken one day to find that their land, during those times when it is not flooded, is nevertheless open to public entry for all the uses embraced by

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[2] In *Fogerty II,* 187 Cal. App. 3d at 234, this became picnicking, hunting, and *biking.* Although possibly a typographical error explains the reason for the change, it makes little difference—California's public trust doctrine is broad enough to embrace both hiking and biking.

California's public trust doctrine. Moreover, the owners' right to use their property, in a manner not inconsistent with any flowage easement acquired by the dam operator, will forever be severely restricted.

The dam at Lake Tahoe is operated by the federal government which controls the flow of water at the lake's only outlet into the Truckee River. The lake is used by the federal government as a reservoir. The dam gates can raise water levels only by about six feet. However, in many areas of gently sloping land, a considerable amount of property is periodically subject to flooding.

The opinion below held that the public right of use arose under a theory of prescription based upon the five consecutive years of *highest water,* backed up by the federal government's dam, since 1944. These were the years 1967 through 1971. *Fogerty II,* 187 Cal. App. 3d at 240. Public rights were thus extended to an elevation of 6228.75 feet above sea level. *Id.*

The effect of the judgment below has been to open these private uplands to the general public for use during those times when the lake's level retreats toward its natural level. Inasmuch as the federal government uses the lake as a reservoir, water levels are frequently below the highest levels achieved in 1967 through 1971.

Many of the properties affected are developed as residential homesites. Although homeowners undoubtedly consider boating and fishing a normal part of the scenery, one can readily understand the feelings of a homeowner facing a group of revelers pulling their boats onto the shore with the announced intention of picnicking in the front yard. The newly declared right of the public to enter private property for such purposes will not only

invade the property owners' privacy but will have obvious impacts on property values.

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SUMMARY OF ARGUMENT

By the judgment below, California has abruptly reasserted its relinquished claim to lands lying between natural high and low water marks on Lake Tahoe. This was accomplished by concluding that, under concepts allegedly adopted by this Court in *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892), the states were "powerless" to relinquish a "public trust" over such lands (*Lyon*, 29 Cal. 3d at 227)—a right which, as defined below, can only be viewed as the practical equivalent of a fee interest. Moreover, it must be assumed that federal lands, as well as private lands, are affected since the decision is premised on the basis of retained sovereign rights.

Serious questions of federal law are presented which should be reviewed by this Court. If California can do what it has done, every other state can do likewise. Property rights long since vested will be overturned. By opening these private lands to uses not embraced by original concepts of navigation, commerce, and fishing, the judgment below constitutes a radical, unforeseeable, and unanticipated extension of state authority. It is based on a perverse analysis of sovereign rights under the equal-footing doctrine and the effect is to deprive, in violation of the Due Process Clause of the Fourteenth Amendment, property owners of rights long since vested. And since the seizure is for public use, the Takings Clause of the Fifth Amendment, incorporated in the Fourteenth Amendment, is also invoked.

As for the holding below that lands located *above the natural high water mark* are also open to California's

"public trust" uses, the *process* by which petitioners were deprived of their rights deserves additional scrutiny. Here, clearly, preexisting property rights have been extinguished without regard to whether the property owners had *notice*, or any means of *obtaining notice,* that their properties were slowly but surely being taken by the State of California for "public trust" uses by the seasonal overflow of their lands by the federal government. This fact alone demonstrates that petitioners have been deprived of property without due process of law.

ARGUMENT

I

THE IMPOSITION OF CALIFORNIA'S PUBLIC TRUST DOCTRINE TO LANDS BETWEEN THE HIGH AND LOW WATER MARKS AT LAKE TAHOE HAS EFFECTIVELY TAKEN THESE LANDS FOR PUBLIC USE WITHOUT THE PAYMENT OF COMPENSATION

In *Barney v. City of Keokuk,* 94 U.S. 324 (1877), this Court concluded that the states were free to determine for themselves the boundaries of private lands fronting on inland navigable waters. The states were thus free to relinquish any claim below high water mark, subject only to the paramount right of navigation over the waters. This Court has consistently adhered to this view. *See Hardin v. Jordan,* 140 U.S. 371, 382-83 (1891); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company,* 429 U.S. 363, 374-75 (1977). As observed in *Lyon,* 29 Cal. 3d at 216, the states exercised these options differently; some states claimed only to low water, some to high water, and others made no claim whatever. California, by statute, is a low water state. Cal. Civ. Code § 830.

The California Supreme Court in *Lyon,* however, relying upon the decision of this Court in *Illinois Central,* concluded that any such recognition of private ownership was revocable and that the states are "powerless" to relinquish their rights as public trustee. *Lyon,* 29 Cal. 3d at 227. Accordingly, under the banner of the public trust doctrine, supported, according to the California Supreme Court, by this Court's holding in *Illinois Central,* the states are free to reassert rights in previously granted lands—rights which are so broad that they are, as noted earlier, the functional equivalent of a fee interest.

Illinois Central does not sanction such a result. The concern in *Illinois Central* was with an attempted alienation of the *permanently submerged* bed of Lake Michigan, action which would inevitably interfere with the navigational servitude. This Court's express concern was with the right of the people to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central,* 146 U.S. at 452.

The problem with the reasoning below is that nothing in *Illinois Central* is inconsistent with the reasoning of *Barney v. Keokuk,* and the decisions of this Court which followed, holding that the states were free to relinquish all rights between high and low water marks save and except for those embraced by a *navigational* servitude. To say that *Illinois Central* authorizes a state 100 years later to reclaim the functional equivalent of a fee is to read into *Illinois Central* something which is simply not there. Moreover, any such conclusion, as a practical matter, renders the *Barney v. Keokuk* rule meaningless. Surely, it was not within the reasonable expectations of those who took title, or their successors, that such title could later be

revoked or reduced to a naked fee. The judgment below reads the law as playing a hoax on unsuspecting purchasers.

As stated by Justice Clark, dissenting in *Lyon*: "To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible." *Lyon*, 29 Cal. 3d at 238.

See also Lyon v. Western Title Insurance Company, 178 Cal. App. 3d 1191 (1986), involving a subsequent unsuccessful claim against the title companies by affected property owners in *Lyon*. There the court agreed with a property owner's contention that *Lyon's* "innovative public trust doctrine . . . is bad law, unsupported by authority, violative of the separation of powers doctrine explicated by the state and federal Constitutions, and has taken his property for public use contrary to the state's Constitution." *Id.* at 1200.

It is submitted that the application of California's expanded public trust concept to lands above low water mark at Lake Tahoe constitutes a taking of private property without payment of compensation. The public is invited to enter. An owner's right of use is severely restricted. As observed by this Court in *Summa Corporation v. California, ex rel. State Lands Commission*, 466 U.S. 198, 205 (1984), an owner is left with little more than a "naked fee."[3]

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[3] In *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 440 n.22 (1983), the California Supreme Court, referring to *Fogerty I*, stated:

"By implication, however, the determination that the property was subject to the trust, despite its implication as to

(Continued on following page)

The fact that the taking has occurred as a consequence of a court decree, rather than by some administrative or legislative action, does not alter the result. This is not a case where the state court is adjudicating disputes between private parties.[4] This is a case where the state court has declared property open to *public use*. The Takings Clause of the Fifth Amendment, as incorporated into the Fourteenth Amendment, addresses the state *as an entity*. As stated in *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897):

> "If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."

The judicial taking issue is comprehensively and persuasively presented in the petitions. The arguments therein need not be repeated here.

(Continued from previous page)

future uses and improvements, was not considered a taking requiring compensation."

Compare this Court's analysis in *Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979), stating:

> "[T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers . . . it does not follow that the pond is also subject to a public right of access."

[4] *Cf. Corporation of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398 (D.D.C. 1986).

II

THE EXTENSION OF THE PUBLIC TRUST DOCTRINE LANDWARD OF THE NATIONAL HIGH WATER MARK HAS ALSO VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS

A. The Finding of a Prescriptive Easement in Favor of the State, Based upon a Use by the Federal Government, Constitutes a Taking of Property for State Purposes Without Compensation

Referring to property above the natural high water mark and the effect thereon of the federal government's dam, the court below stated:

> "Lands were inundated which, before statehood, had belonged to the littoral owners free of the public trust." *Fogerty II,* 187 Cal. App. 3d at 230.

The court then held that the inundation by the federal government gave the state the right to impose its public trust easement on those lands. The legal theory was that adverse use by the federal government created prescriptive rights for different uses on behalf of the state. The result is an appropriation of property for state use based upon a theory of adverse use even though there was no adverse use by the state.

The adoption of such an arbitrary and unexpected rule of property law constitutes a judicial taking. *See, e.g., Hughes v. State of Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Petitioners have persuasively argued this point and further elaboration is not required here.

B. The Adoption of a Rule of Law Which Results in a Forfeiture Without Adequate Notice and Opportunity to Take Protective Action Deprives a Person of Property Without Due Process of Law

There can be no question but that the use of petitioners' properties by the federal government for water storage purposes involved the taking of an interest *by the federal government.* In 1957, the California Attorney General specifically found that the doctrine of laches as well as the applicable period of limitations precluded affected property owners at Lake Tahoe from pursuing a claim against the federal government. 30 Op. Att'y Gen. 262, 271-72 (1957). The opinion concluded that a taking had occurred "in the nature of a flowage easement, an easement for intermittent flooding." *Id.* at 271. There was no hint, however, that the rights of the property owners were otherwise affected.

Nevertheless, the court below concluded that the mere presence of water on private property, backed up by a government dam, will convert the ownership to public use solely as a consequence of the passage of time. Such a result cannot be permitted to stand.

The finding of an easement in favor of the public, based upon a use which does not impart knowledge of the nature and extent of the easement being claimed, is inequitable, confiscatory, and deprives the affected owners of their property without due process of law.

Such a rule also can only lead to unnecessary conflicts between the affected parties. The dilemma presented can be simply put: When the federal government builds a dam for water storage purposes, or raises waters behind an existing dam to new levels, must the affected

property owners pursue a claim against the federal government, the state government, or both, not just with respect to the occasional overflow (to which they may not object), but also for the loss that ultimately will result from the imposition of a public trust easement should they fail to take such action?

Applied prospectively, the rule adopted below is a trap for the unwary and stirs up litigation by those who may have learned of the novel rule and who thus appreciate the necessity of pursuing a claim against someone in order to preserve their property.

Applied retrospectively, to the property owners at Lake Tahoe, the result is outright confiscation.

The entire foundation of the concept underlying prescriptive easements is premised upon an adverse use *which imparts knowledge as to the nature and extent of the claim being made. See Restatement of Property* § 458, Comment to Clause (c) (1944), which states in part:

> "The requirement that, to be adverse, a use must be open and notorious is for the protection of those against whom it is claimed to be adverse. It enables them to protect themselves against the effect of the use by preventing its continuance."

The forfeiture of property rights as a consequence of adverse use is based upon a limitation of actions concept. A property owner who sits on his rights while his land is openly invaded by another ultimately loses his right to contest the entry. And the intruder will obtain a right to continue the intrusion.

Thus, in the early case of *Hawkins v. Barney's Lessee,* 30 U.S. (5 Pet.) 457 (1831), this Court recognized that where one party is actually making use of the property of

another, the other may, with the passage of time, lose his right to challenge the use. This Court said:

> "Such laws have frequently passed in review before this Court; and occasions have occurred in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Id.* at 466.

A different result must, however, necessarily follow where a property owner is stripped of property where it has never been entered and occupied, where there has never been an adverse claim of the nature being asserted here, and thus where there has been no notice of such a claim being made.

In *Texaco, Inc. v. Short,* 454 U.S. 516 (1982), this Court reviewed an Indiana statute which provided that a severed mineral interest would be extinguished if unused for a period of 20 years unless the mineral owner filed a claim prior to the end of the 20 year period or within a 2 year grace period following enactment of the statute. The issue was whether the statute imparted adequate notice and opportunity to affected mineral owners to take effective action to protect their interests. In a five-to-four decision, the majority held that the Indiana law provided such adequate notice and opportunity. However, had it not been for the finding of adequate statutory notice and the two year grace period, there is little question but that the majority would have joined the dissent.

The dissent, authored by Justice Brennan, stated the issue in a manner that could be applied word for word to the instant situation by merely substituting the word "California" for the word "Indiana" and the word "petitioners" for the word "appellants":

> "The question presented here is simply whether the State of Indiana has deprived these appellants of due process of law by extinguishing their pre-existing property interest without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the imminent taking of their property or their obligations under the law." *Texaco, Inc.*, 454 U.S. at 540.

Justice Brennan went on to observe:

> "If Indiana were by simple fiat to 'extinguish' all pre-existing mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, that action would surely be unconstitutional and unenforceable—at least absent just compensation." *Id.* at 542.

Finally, it was noted:

> "Property owners have historically been allowed to rest easy in the knowledge that their holding is secure, absent some affirmative indication to the contrary; to rely on the general practice that '[n]otice is required before property interests are disturbed.' " *Id.* at 547.

There is nothing in the majority opinion inconsistent with the views of Justice Brennan as to whether some kind of notice was required. The majority merely concluded that, under the Indiana law involved, adequate notice had been given. In the instant situation, however, *no notice was given.* Paraphrasing from Justice Brennan's analysis, as applied to the situation at Lake Tahoe, one can only conclude that "an average citizen would have no reason to regard the triggering event [*i.e.*, federal flooding] as calling for a heightened awareness of one's legal obligations [to protect against a future state claim permitting dry land intrusions]." *Id. See also Hodel v. Irving,* 55 U.S.L.W. 4653, 4657 (May 18, 1987) (Stevens, J., concurring).

The inequity at Lake Tahoe is even more pronounced, however, because only a few years before the alleged "prescriptive" period began to run, the California Attorney General in an opinion published at 43 Op. Att'y Gen. 291 (1964) expressly found that the boundaries of a nontidal navigable lake or river are "to be established according to its last natural elevation, *not affected by artificial influences, such as dams or locks.*" *Id.* at 297 (emphasis added). The opinion further emphasized that this rule has been adhered to "even though the artificial influences were dams and locks constructed by the Federal Government." *Id.*[5]

In short, the periodic overflow caused by the federal dam not only failed to give notice of a potential state claim, but the State of California, three years before the prescriptive period began, actually disavowed any such claim. It would be hard to find a clearer case involving lack of due process.

III

THIS CASE IS RIPE FOR REVIEW

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), demonstrates that the petitions for certiorari filed in this Court after *Fogerty I* were premature. Further proceedings were contemplated. The judgment was not final. No

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[5] The opinion did recognize that riparian or littoral owners, who have made substantial expenditures on improvements in reliance on artificial changes caused by another, may be able to enjoin the other from altering the artificial condition. The theory is estoppel. But that rule has no application here. The opinion repeatedly stressed that this was a theory available to the riparian or littoral owner against the party making the change. The littoral owners here have not altered natural levels and there are no state improvements made in reliance on any littoral owner actions which would support a theory of estoppel against the owners.

determination had been made as to *how* the federal government's use of Lake Tahoe as a reservoir would affect the quantity of land to be claimed by the state.[6] As argued by the California Attorney General in its opposition to the earlier petitions, "issues respecting the location of high and low water lines remain to be tried on remand to the state trial court." Respondent's brief in opposition at 4. However, if the decision below is left standing, the judgment will be final and will have been *applied* to specifically identified property lying below an elevation of 6228.75 feet thus meeting the *Williamson* standard.

No further action by state officials will be required before the petitioner's property rights are defeated. California's public trust doctrine is self-actuating. Rights inure directly in the members of the public. *See Marks v. Whitney*, 6 Cal. 3d 251, 261 (1971), where it was held that members of the public may not be barred from asserting or exercising public trust rights on privately owned lands subject to the trust. As stated in *Summa Corporation*,

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[6] This was resolved in *Fogerty II*, 187 Cal. App. 3d at 239: "The need for water storage . . . fluctuates from season to season and ultimately from year to year. We believe it wholly unnecessary to the doctrine of prescription for water impounded behind a dam to remain in place continuously for the five-year period in order for prescriptive rights to attach. Practical experience tells us no reservoir operates that way. We believe, instead, that the needs of the reservoir operator are determinative. [Citation omitted.] Where the reservoir operator returns the waters to a zenith each water year and maintains the water at that elevation for the duration of his needs his use of the reservoir is 'continuous' up to and including that highest point. . . . For purposes of the public trust doctrine, we shall therefore set the high watermark of Lake Tahoe at the highest elevation actually reached by the 'current' lake in five sequential years."

466 U.S. at 205, the landowner is left with "little more than naked fee" because any private use "remains subject to the right of the State *or any member of the public* to assert the State's public trust easement." (Emphasis added.)

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CONCLUSION

At least two fundamental infirmities led up to the judgment below which resulted in a violation of petitioners' property rights guaranteed by the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments.

The first is the assumption that this Court's holding in *Illinois Central* authorized the imposition of California's public trust concept to lands lying between the high and low water marks of inland navigable waters. The declaration below to this effect not only raises a serious question of federal law under the equal-footing doctrine but, if allowed to stand, will result in a taking of private property without compensation.

The second infirmity involves the holding below that periodic submergence of littoral lands due to the regulation of a dam by the federal government's watermaster during the years 1967 through 1971 has resulted in a prescriptive easement in favor of the state authorizing a wide variety of public uses. These include picnicking, hunting, and hiking. However, to reach such a result, in conformity with due process requirements, the court below also would have had to conclude that the periodic submergence somehow put the property owners on *notice* that these newly authorized activities could now take place on their properties during those times of the year when they are not submerged. The court also would have had to conclude

that the property owners sat on their rights, that they should then and there have sued the federal government and the State of California under some theory of action, and that, in failing to do so, they forfeited their rights under concepts of adverse use.

It is respectfully submitted that no such notice was generated and no such causes of action accrued. If allowed to stand, this holding will result in a taking without compensation. It additionally violates fundamental due process guarantees.

For the reasons stated above, it is respectfully requested that the petitions for certiorari be granted.

DATED: June, 1987.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae,
Pacific Legal Foundation